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SUPREME COURT, U.S.

Supreme Court of the United States

TSA STORES, INC.,

Petitioner,

v. No. 07-1163

FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

Respondent.

In Opposition to Petition for Writ of Certiorari to the Supreme Court of Florida

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES

The Florida Department of Agriculture and Consumer Services is a regulatory agency of the State of Florida and will be referred to as ("FLORIDA") except as otherwise noted within the text. Florida, was the Plaintiff in the trial court having sued **The Sports Authority, Florida, Inc.**, a Florida Corporation, which was later merged into TSA Stores, Inc.

CORPORATE DISCLOSURE STATEMENT

The Sports Authority, Florida, Inc., a Florida Corporation, should be added to the Corporate Disclosure Statement. Hereafter, all of the Sports Authority family of corporations will be referred to as ("The Sports Authority") or ("TSA"), except as otherwise noted within the text.

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CITATIONS OF OPINIONS AND ORDERS BELOW

Final Judgment and Permanent Injunction After Remand—*State of Florida Dep't of Agriculture and Consumer Services v. The Sports Authority Florida, Inc. a Florida Corporation,* Case No. 03-CA-10535, Circuit Court for Orange County, Florida, February 18, 2007. Pet.App. 3a.

Order – *TSA Stores, Inc., etc. v. Florida Dep't of Agriculture and Consumer Services,* Case No.: SC07-1101, Supreme Court of Florida, December 13, 2007. Pet.App. 1a.

Order—*TSA Stores, Inc., a Delaware Corporation v. Dep't of Agriculture and Consumer Services,* District Court of Appeal of the State of Florida, Fifth District, Case No.: 5D06-1775, April 20, 2007. Pet.App. 7a.

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Order on Motion for Summary Judgment and Permanent Injunction *State of Florida, Dep't of Agric.and Consumer Services v. The Sports Authority Florida, Inc.*, Case No. 03-CA-10535, Circuit Court for Orange County, Florida, October 31, 2005. Pet.App. 25a.

Order - *State of Florida, Dep't of Agric. and Consumer Services v.* The Sports Authority Florida, Inc., Case No. 6:04-cv-115-Orl-JGG, U.S. District Court, Middle District of Florida, App 31a

STATEMENT OF JURISDICTION

The Florida Fifth District Court of Appeal decided this case based on sections 501.059(1)©3., and 501.059(7)(a), Florida Statutes. It: (i) decided that § 501.059(1)(c) 3. Fla. Stat. exempted persons who had made a purchase from The Sports Authority within the past 18 months from the definition of "unsolicited telephonic sales calls;" and (ii) stated "we need not reach the issue of whether the states have jurisdiction over automated calls originating out of state. The [Florida] statute covers this contingency."

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Constitutional Provisions

(None to Respondents knowledge)

Statutes

Telephone Consumer Protection Act, 47 U.S.C. § 227. Pet.App. 44a.

Florida Statute § 501.059 Pet.App. 64a.

Regulations

47 C.F.R. § 64.1200. Pet.App. 73a.

STATEMENT OF THE CASE

Respondent disagrees with Petitioner's Statement of the Case in the following particulars.

The Sports Authority, Florida, Inc., a Florida Corporation having business locations in Florida was the entity that "knowingly allowed" the 73 telephonic sales calls (made by automated dialing machines that played prerecorded messages) that constituted violations of Florida Statute § 501.059(7)(a). The merger by which The Sports Authority, Florida, Inc. was absorbed into TSA Stores, Inc. did not occur until after the last of subject telephonic sales calls were "knowingly allow[ed]" and this lawsuit was filed.

Florida prosecuted the Sports Authority for: (i) *causing* the subject 77 "unsolicited telephonic sales calls" that were alleged as violations of § 501.059(4) Fla. Stat.; and (ii) *knowingly allow[ing]* the 73 pre-recorded "telephonic sales calls" that were made using automated dialing machines in violations of § 501.059(7)(a) Fla. Stat. See, State of Florida Dep't of Agriculture and *Consumer Services v.The Sports Authority Florida, Inc. a Florida Corporation,* Case No. 03- CA-10535, Circuit Court for Orange County, Florida, April 11, 2006. The Florida Fifth District Court of Appeal stated ". . .we need not reach the issue of whether the states have jurisdiction over automated calls originating out of state. The [Florida] statute covers this contingency." Pet.App. 17a.

The Florida Fifth District Court of Appeal reversed the 77 violations of Florida Statute § 501.059(4) based upon the "safe haven" clause

contained in Florida Statute § 501.059(1)© 3. The Sports Authority prevailed based solely upon the State Court's interpretation of state law. The Florida trial Court later entered its Final Judgment and Permanent Injunction After Remand. *State of Florida Dep't of Agriculture and Consumer Services v. The Sports Authority Florida, Inc. a Florida Corporation*, Case No. 03-CA-10535, Circuit Court for Orange County, Florida, February 18, 2007. Pet.App. 3a

ARGUMENT: REASONS FOR DENYING THIS PETITION

Introduction

The Department of Agriculture and Consumer Services, ("Florida") is a state regulatory agency and the enforcing authority of Section 501.059, Florida Statutes. Florida, pursuant to Section 501.059(3), Florida Statutes maintains a list of telephone numbers of consumers that do not want to receive telephone sales calls from telephone solicitors or telemarketers. These consumers pay Florida an annual fee to have their telephone number appear on the "no sales solicitation call" list. The No-Sales Statute §501.059(4), Fla. Stat. makes it unlawful to make, or *cause* to be made, unsolicited telephonic sales calls to persons whose numbers appear on the list published by Florida, which list incorporates the federal do-not-call list.[1] Further, Section

[1] 47 United States Code § 227 (3) (J) & (K).

501.059(7)(a) Florida Statutes makes it unlawful for a telemarketer to make or *knowingly allow* a telephonic sales call and use an automated dialing system for the selection and dialing of telephone numbers or playing a recorded message when the number called is answered. § 501.059 Fla. Stat. is an integral part of Florida's consumer protection law.

> Laws concerning consumer protection, including laws prohibiting false advertising and unfair business practices, are included with *the states' police power*, and are thus subject to this heightened presumption against preemption. (*See California v. ARC Americal Corp.* (1989) 490 U.S. 93, 101, 109 S. Ct. 1661, 104 L.Ed. 2d 86 [unfair business practices]; *Smiley v. Citibank* (1995 11 Cal. 4th 138, 148, 44 Cal. Rptr 2d 441, 900 P.2d 690 [consumer protection], aff'd. (1996) 517 U.S. 735, 116 S. Ct. 1730, 135 L. Ed. 2d 25 ....

Black v. Financial Freedom Senior Funding Corp., 92 Cal. App. 4th 917, 112 Cal. Rptr. 2d 445, 452-53 (Cal Ct App. 2001).

Florida received complaints from numerous consumers that The Sports Authority, Florida, Inc. ("TSA"), was violating Florida's statutes by making, or *causing* to be made, unsolicited telephonic sales calls to such consumers whose phone numbers were on the state's no sales solicitation call list; and playing, causing, or *knowingly allowing* to be played recorded messages when the numbers called were answered. After each consumer complaint, Florida sent a letter to TSA together with a copy of the consumer's complaint and a copy of Florida's statute.

TSA failed to comply with Florida law. Suit was filed seeking an injunction and civil penalty. TSA filed a Petition For Removal to the United States District Court for the Middle District of Florida alleging that Florida's law was preempted by 47 U.S.C. §227. The United States District Court entered an Order of Remand finding that Florida's law was not completely preempted by 47 U.S.C. §227. See, *State of Florida, Department of Agriculture and Consumer Services, v. The Sports Authority Florida, Inc.*, Case No. 6:04-cv-115-Orl-JGG, U.S. District Court, Middle District of Florida. Pet.App. 31a. TSA seeks to have this Court declare that Florida's statute is preempted by Federal Law. The relief sought by TSA would allow a telemarketer to make, *cause* or *knowingly allow* telemarketing calls to Florida consumers and the playing of a recorded message when the number called is answered, in violation of Florida law.

I. THE FLORIDA FIFTH DISTRICT COURT OF APPEAL HAS [NOT] RULED ON AN IMPORTANT QUESTION OF FEDERAL LAW NOT YET SETTLED BY THIS COURT

A. The intent of the United States Congress and FCC is [not] clear – [that] – interstate telephone calls are to be regulated solely by federal law.

The U.S. District Court For The Middle District of Florida ruled that Florida Statute 501.059 is not ***completely preempted*** by the

> **Telephone Consumer Protection Act, 47 U.S.C. §227 ("TCPA"). (Emphasis added).**

Section 501.059, Florida Statutes is not preempted by the TCPA or included within its contemplation. The TCPA defines "telephone solicitation" as the initiation of a telephone call. The TCPA also provides that it is unlawful to initiate or make telephone solicitations to persons whose names appear on the federal do-not-call list. Florida law differs from the TCPA. Section 501.059(4), Florida Statutes, provides:

> "No telephone solicitor shall make ***or cause*** to be made any unsolicited telephonic sales call to any residential, mobile or telephonic paging device telephone number, if the number for that telephone appears in the then-current quarterly listing published by the Florida." [Emphasis added].

Also, section 501.059(7), Florida Statutes, provides:

> "No person shall make ***or knowingly allow*** a telephonic sales call to be made if such call involves an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to the number called." [Emphasis added]. Neither **causing** a call to be made, nor **knowingly allowing** an automated dialing system that plays a recorded message is preempted by the TCPA.[2]

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[2] See, *TSA Stores, Inc. v. Department of Agriculture and Consumer Services*, Case No. 5D06-1775 (Fla. 5th DCA 2007), *infra*. Pet.App. 13a and 17a,

Florida's action against TSA is for **causing** unsolicited telephonic sales calls, and for **knowingly allowing** recorded messages to be played by telephonic sales calls. The entity actually making the calls—and the entity **causing** or **knowingly allowing** the calls to be made—may be separate entities. Here, a Florida corporation hired (**causation**) a California company to make calls to Florida consumers. Florida's statute is violated by the Florida Corporation if the California caller does not follow Florida law in the manner such calls are made. Assuming *arguendo* (and Florida does not agree with the argument) that initiation of a telephonic sales call from across state lines requires preemption. But, **causing** – or **knowingly allowing**— the call to be made is an activity not contemplated by the TCPA and is properly regulated by the Florida statute. **Causing** or **knowingly allowing** a call can be done through business practices such as hiring out-of-State telemarketers, thus setting in motion practices that knowingly allow playing a recorded message when the number called is answered. TSA: having (i) ***caused*** calls to be made to Floridians whose numbers appear on Florida's do not call list, and (ii) ***knowingly allowed*** playing of prerecorded messages when Florida consumers' numbers are answered, are activities done in Florida, separate and apart from the making of the phone calls from across the state line.

> [TSA] essentially argues that the federal statute has preempted state laws governing the regulation of unsolicited sales calls and the improper use of prerecorded messages claims. Yet the TCPA specifically disclaims a complete preemption in these areas. *See Fla. Dep't of Agric. & Consumer Servs. v. The Sports Authority Fla., Inc.* Case No. 6:04-cv-115-Orl-JGG, 2004 U.S. Dist. LEXIS 29646, at *9 (M.D. Fla. June 4, 2004). Thus, the TCPA carries no implication in its language that Congress had intended to preempt state law in this regard.
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> * * * *
>
> [TSA] suggests, in essence, that the Florida statute might be fully avoided by the simple expedient of taking the automated call machine to a different state, and having the calls to Florida consumers made [from] there. Because of the language of the Florida statute, however, we need not reach the issue of whether the states have jurisdiction over automated calls originating out of state. The statute covers this contingency. . . .

TSA Stores, Inc. v. Department of Agriculture and Consumer Services, Case No. 5D06-1775 (Fla. 5th DCA 2007). Pet.App. 13a, and 17a.

B. This Court has ruled that the Telecommunications Act and the FCC can preempt state law as applied to interstate calls.

Florida answers this assertion by reference to the argument in Part A., above, and more particularly the excerpts from the opinion of the Florida Fifth District Court of Appeal quoted in the paragraphs next above.

II. THE FLORIDA SUPREME COURT'S DECISION CONFLICTS WITH DECISIONS BY COURTS IN OTHER JURISDICTIONS.

TSA's assertion begs the Question: Whether a decision by the highest state Court—based solely on its interpretation of a general State law more restrictive than the federal law—is preempted by that same federal law that disclaims preemption:

> [n]othing in the TCPA was to be construed to prohibit the State "from proceeding in State court on the basis of an alleged violation of any general or criminal statute of such State."

TSA Stores, Inc. v. Department of Agriculture and Consumer Services, supra. Pet.App. 17a.

A. The California, Ohio and Texas decisions cited by TSA appear inapposite to the foregoing Florida opinion, and with that of the U.S District Court, M.D. of Florida in *State of Florida, Department of Agriculture and Consumer Services, v. The Sports Authority Florida, Inc., supra,.*

B. and C. Florida will not attempt to rebut those cases cited by TSA which appear to be in general agreement with the Florida Fifth District Court of Appeal. However, we note that TSA has not in its Petition analyzed the impact of relevant state law on those decisions, as did the Florida court in the case *sub judice.*

III. [THERE IS NO] NEED FOR U.S. SUPREME COURT RESOLUTION

Florida agrees with TSA's analysis of the U.S. District Court's Order of Remand in *State of Florida, Department of Agriculture and Consumer Services, v. The Sports Authority Florida, Inc., supra.* Yet, Florida disagrees that a decision of national uniformity by this Court is necessary to avoid frustrating the purpose of the TCPA. Contrary to TSA's argument, Congress enacted the TCPA to broaden State authority, not supplant State law. The burden in preemption cases is upon the party seeking to preempt a state's law. The case of *AT&T Corp., v. Public Utilities Commission of Texas,* 373 F.3d 641 (5th Cir Ct. 2004) stated:

> "The burden of persuasion in preemption cases lies with the party seeking annulment of the state statute. *Green v. Fund Asset Mgmt., L.P.,* 245 F.3d 214, 230 (3d Cir. 2001) ("Finally, we note that the party claiming preemption bears the burden of demonstrating that federal law preempts state law." (citing *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 255, 104 S.Ct. 616, 78 L. Ed.2d 443 (1984))."

TSA has failed to meet its burden. Mere inconvenience in complying with state law is not grounds to have the state's law preempted. Preemption is not inferred nor granted by implication.

There is no conflict preemption. Conflict preemption occurs where compliance with both federal and state laws is impossible. If it is possible to comply with both federal and state law, there is neither conflict nor a frustration of purpose. See generally, Rotunda, R. & Nowak, J., Treatise on Constitutional Law; Substance and Procedure, § 12 (2d ed. 1992 & Supp. 1993)." *Bravman v. Baxter Healthcare Corp.*, 842 F. Supp. 747, 753 (S.D. N.Y. 1994; *see also Ginochio v. Surgikos Inc.*, 864 F. Supp. 948, 951 (same). It is possible for TSA to comply with both laws simply by following the Florida law. Doing so does not violate any part of the TCPA.

TSA could have pursued an appeal of the U.S. District Court's Remand directly to the Eleventh Circuit. TSA elected to defend the allegations it violated State law in the State Court. Having prevailed on 77 counts upon the State Court's interpretation of State law TSA should not now be heard to complain that that very law should be preempted.

CONCLUSION

For the reasons stated herein TSA's Petition for Certiorari should be denied (1) because Florida's law is not preempted by the TCPA; or (2) because the issue of complete preemption has already been decided by the United States District Court for the Middle District of Florida pursuant to TSA's election of remedies.

Respectfully submitted,

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